

OPINION
51-26

July 25, 1951 (OPINION)

COUNTIES

RE: Commissioners - Expense for Meals and Lodging While Attending
 Board Sessions

We have perused your letter of July 21, 1951, very carefully and have examined the statutes and opinions of this office cited by you. It seems that the only opinion of this office relating directly to the question is that of February 27, 1936, found on page 60 of the Report of the Attorney General for the period of July 1, 1934, to June 30, 1936. At the time that opinion was written, the present custom now followed by this office in giving its opinions had not been adopted. Now, no opinion is given unless it is concurred in by at least a majority of the attorneys in the department, so that now office opinions are not the opinions of the writer only. The opinion above referred to was not concurred in by any other lawyer in the office and was merely one man's opinion.

Courts have universally held that an opinion of the court might be later reversed, if the court was satisfied that it was erroneous. The same custom has been followed in the past by this office, and when a former opinion is cited, it is not followed unless a majority of the office members are agreed that it is correct.

On examination of the opinion cited by you, we are agreed that it is erroneous and not justified by the reasoning of the writer and not in accord with legal principles applicable to the question. Therefore, we hereby reverse said opinion.

On examination of the statutes past and present, we find that the legislatures have dealt only with two matters when treating of county commissioners, to-wit, with compensation for their personal services by a per diem rather than a salary, and travel expense by a mileage expense.

"The per diem is," in the words of the court in the case of State v. Richardson and Carroll, 16 N.D. 1, at page 8, "for time they are necessarily employed in the duties of their office." That is, the per diem is compensation for personal services and for personal services only, nothing else. And the travel allowance "is allowed for the distance actually traveled in attending the meetings of the board." Mileage of all public officials is allowed only in case the official provides his own mode of conveyance. If he is using a publicly owned automobile, for instance, he gets no mileage. Therefore, it is fair to assume that the mileage allowance is intended as compensation for the use of the conveyance, for oil and gas necessarily used, and for nothing else.

No one would contend that a county commissioner residing in his

county seat would, under any conditions, be entitled to compensation for his living expense of meals and lodging. But can it be contended that a commissioner who has traveled many miles to get to the place of meeting, and is required to remain there for more than one day is not entitled to be compensated for his actual and necessary expense for meals and lodging. If it be argued that he must pay these expenses out of his per diem, it must be conceded that he is receiving small compensation for his personal service. And his actual mileage allowance would ordinarily not be sufficient to pay for either meals or lodging.

Section 44-0804 N.D.R.C. 1943 fixes a limit to claims for personal sustenance at five dollars per day for time engaged in the performance of public duties within the state. This office has held that this five-dollar limitation applies to meals only, for lodging is not sustenance.

The right to reimbursement for actual expenses while engaged in performance of public duties is not dependent upon any specific statutory provision.

67 C.J.S. 329, section 91a states the rule of common law as follows:

"Where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and receive reimbursement therefor."

Can it be said that a county commissioner who is attending a meeting which extends over the usual meal times and over night, if the meeting extends over one day, should not eat or sleep? We think not. In only two reported cases that we know of, it was sought to remove county commissioners from office for illegal charges, and in neither case was any question raised as to the propriety of charges for meals or lodging. It is highly probable that if the prosecution had questioned such charges, emphasis would have been laid upon them. Both cases were tried in the horse-and-buggy days when the commissioners undoubtedly traveled by horse and buggy. We refer to the cases of State v. Richardson, 16 N.D. 1, 109 N.W. 1026 and State v. Borstad, 27 N.D. 533, 147 N.W. 380. The first case was decided in 1906 and the other in 1914.

It must be remembered that reimbursement of an officer for expense necessarily incurred by him in the performance of his official duties is not compensation for his personal services.

Therefore, it is the opinion of this office that a county commissioner necessarily away from his home either attending a meeting of the board at the county seat or attending to other duties of his office is entitled to reimbursement for expenses for meals, lodging, telephone calls or telegrams, etc. necessarily incurred in the performance of his official.

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